IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO ET AL.,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLEE

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HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESSINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

I

STATEMENT OF THE CASE

This case is an appeal from the final decree (R. 70) on opinion of the District Court (R. 66), not officially

reported, granting and entering a permanent injunction in favor of appellee, against appellant here, defendant below, Harry J. Kirk, as a state officer of Ohio, namely, state highway director of that state, and against the other appellants here, defendants below, as proper but not necessary defendants, in a suit instituted by appellee in the District Court of the United States for the Southern District of Ohio, Eastern Division, at Columbus.

The purpose of the suit, as shown by the allegations and prayer of the bill or complaint (R. 1 to 17), was to secure for appellee a temporary restraining order, an interlocutory injunction and finally a permanent injunction suspending and enjoining enforcement, operation and execution of a statute of Ohio by restraining and enjoining action of the state officer in the enforcement and execution of the statute on the ground that it is unconstitutional, in that (a) it impairs the obligation of a certain perpetual grant, contract (Stipulation Exhibit 1, R. 37) originally entered into between the State of Ohio and one Peter Minor on September 1, 1842, but readjusted and rewritten February 23, 1846 (Stipulation Exhibit 2, R. 43) *by* which grant, as readjusted, the State of Ohio for a valuable consideration sold and conveyed to said Peter Minor, his heirs and assigns forever, a sufficient quantity of water from the Miami and Erie Canal at the Village of Providence (unincorporated), in Lucas County, Ohio, when properly applied to propel 3½ pairs of 4½ foot millstones, with all the labor saving machinery necessary for the manufacture of superfine flour and to be applied at all seasons of the year (the original agreement granted water for eight pairs of such stones); and that said statute impairs the

obligation of a certain leasing contract entered into between appellee and The Defiance Gas & Electric Company, an Ohio corporation, and hereinafter designated "Electric Company," which Electric Company in the year 1922 became the successor and owner in title to said Peter Minor of all the rights under said perpetual grant, as readjusted, and which Electric Company in the year 1922, after its acquirement of said rights entered into said leasing contract with appellee, by which said Electric Company let and leased unto appellee for a valuable consideration from the year 1922 to December 19, A. D. 2004, the flour and feed mill located on said canal and known as Pilliod mill at the Village of Providence, together with all the machinery, fixtures, tools and other equipment located in said mill, together with the right in appellee, its successors and assigns, to take sufficient water from said the Miami and Erie Canal, to be used through the mill race then and now passing under said mill, to turn one turbine wheel for the purpose of running the machinery of said mill, such right to take said water to be limited to the right to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet in height, for not exceeding ten hours per day; (b) said statute deprives appellee of its property rights in said contracts without due process of law; and (c) said statute is in contravention of and contrary to Section 19 of Article I of the Constitution of Ohio.

The case was submitted on April 14, 1928, on the application of appellee for an interlocutory injunction, supported by the verified bill of complaint and affidavits, before Honorable Maurice H. Donahue, circuit judge of the United States, and Honorable Benson W. Hough

and Honorable Smith Hickenlooper, district judges, as a court constituted under Section 266 of the Judicial Code, Section 380 of Title 28 of the United States Code, and on that day an order granting an interlocutory injunction was entered and bond was filed by appellee in compliance therewith (R. 63).

The suit was so instituted against George F. Schlessinger, as director of the department of highways of Ohio, a citizen of Ohio and resident within the jurisdiction of the District Court, Richard D. Wisda, superintendent of public works of Ohio, and Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, as county commissioners of Lucas County, Ohio. Schlessinger subsequently resigned and left office on June 15, 1928. Thereafter on September 8, 1928, a motion was filed by appellee in the case for an order substituting Harry J. Kirk as defendant in the place of Schlessinger, Kirk having been appointed to succeed Schlessinger in the office. Appellant, Harry J. Kirk, consented to the substitution, entered appearance in the cause and an order of the court substituting him as such party defendant was filed on that day (R. 67 and 69).

The cause was submitted on final hearing on December 3, 1928, was heard before and determined by the above named judges sitting as a court constituted as aforesaid, on the bill of complaint (R. 1), the answers (R. 18 and 24), a stipulation and agreement between the parties on the evidence (R. 31), Stipulation Exhibits Nos. 1 to 5, inclusive (R. 37 to 63), and argument of counsel. Thereafter the judges filed their opinion and a final decree was entered as shown at the beginning of this statement.

The bill of complaint shows that appellee is a corporation organized and existing since prior to the year 1922 under the laws of Ohio, with its principal office and place of business at the Village of Grand Rapids, Wood County, Ohio, of which State it is a citizen, residing in the Village of Grand Rapids; that it is so organized for the purpose of milling wheat, corn and other grains and manufacturing flour and other cereal products therefrom and supplying the same to the public and for the purpose of acquiring, leasing and holding all property and rights of any and all kinds necessary to be used in conducting its said business; that it occupies and operates under said lease, expiring December 19, A. D. 2004, the milling property located immediately above guard lock, being Lock No. 9 on the Miami and Erie Canal, the Pilliod mill, on the north side of the Maumee River directly opposite said Village of Grand Rapids; that Schlessinger was the duly appointed, qualified and acting director of the department of highways of the State of Ohio, and as such had jurisdiction and control over the lands and ways belonging to said state and used or intended to be used by said state as public highways, including the Miami and Erie Canal lands extending from the Maumee side-cut of said canal in Maumee, Ohio, southwesterly to the Maumee River at the point where the canal joins the river near the Village of Providence, Lucas County, Ohio; that the matter in controversy in the suit exceeds, exclusive of interest and costs, the sum of $3,000.00 and arises under the Constitution of the United States of America.

The bill further shows that on November 24, 1827, one Peter Minor acquired title to and became the owner

of a section of land containing 643 acres lying and abutting on and along the north side of the Maumee River and extending up and down said river southwesterly and northeasterly of the location of said Pilliod mill; that the State of Ohio, beginning with the year 1825, provided for the construction of and thereafter constructed what, since the year 1849, has been known as the Miami and Erie Canal, extending from the Ohio River through and from the City of Cincinnati, Ohio, northerly to and through the cities of Dayton and Defiance, Ohio, and northeasterly from the west line of the State of Ohio through said City of Defiance along the northerly bank of or on the Maumee River past said Village of Providence, through the Villages of Waterville and Maumee, Ohio, into and through the City of Toledo to Lake Erie, this section from the west Ohio state line to Lake Erie being then known as the Wabash and Erie Canal; that prior to the construction of said canal along and on the north bank of the Maumee River, past the Village of Providence, said Peter Minor had constructed a mill on his land at the present location of the Pilliod mill; that southwesterly of and up the river from his mill, he had constructed on his land a dam across the river for the purpose of diverting water through his mill race, contemporaneously constructed by him, through his said land from above the dam to and through his mill situated as aforesaid; that thereafter the State of Ohio in constructing this section of the canal (this construction began in 1837 and was completed in 1842), constructed it through said mill race of Peter Minor using his land and destroying his water power, and in that construction tore down and removed his mill, erected said Lock No. 9

or guard lock at its present location as shown on Stipulation Exhibit No. 5 (R. 63), and completed the construction of said canal on northeasterly to Lake Erie as aforesaid; that the State of Ohio as a means of furnishing water for the operation of the canal, constructed a dam (Grand Rapids State Dam) across the river at the location of the dam constructed by Minor (Stipulation Exhibit No. 5, R. 63); that thereafter on September 1, 1842, the State of Ohio, through the board of public works, for the purpose of compensating Minor for the destruction of his mill and to restore to him the water he had theretofore been using by virtue of his riparian ownership on the Maumee River in the operation of his mill, paid him $2500.00 for destruction of the mill and properly executed and delivered to him the perpetual grant of water hereinabove described; that thereafter and prior to February 10, 1846, the state being unable to furnish water for the eight pairs of millstones, Minor made claim against the State of Ohio for a readjustment of the perpetual grant of September 1, 1842, and on February 10, 1846, the General Assembly of Ohio adopted a resolution, which provided

> "that the board of public works are hereby authorized to examine the claim of Peter Minor, for the non-performance of a certain contract entered into by R. Dickinson, acting commissioner of the board of public works, with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the state and the said Minor, and that they report to the commissioners of the canal fund any further sum which they may find due him; provided that the said Minor shall, before the investigation of his claim, execute and deliver

> to the said board a full and final release to the state of all further claims of any description, except so much as may be awarded to him by said board under this resolution" (R. 43);

that on February 23, 1846, an adjustment was made between Minor and Ohio in pursuance of the resolution, through which adjustment and agreements then entered into between him and the state he was paid an additional award of $2800.00 and was granted the right to himself, his heirs and assigns forever, to draw sufficient water from said canal for hydraulic purposes from just above said guard lock to operate 3½ pairs of 4½-foot millstones (Stipulation Exhibit No. 2, R. 43); that ever since that time Minor and his successors in the chain of title, including appellee, have had the use of the water power thus assured to them under the agreement of September 1, 1842, as readjusted as aforesaid; that said Pilliod mill was thereafter erected on the site of Minor's former mill and it has been operated there for about 50 years by successors in title to said Peter Minor in the ownership of the water rights under the perpetual grant of September 1, 1842, as readjusted on February 23, 1846, the water called for by the grant, as readjusted, being used in operation of this mill; that in the year 1922 the Electric Company became the owner of all the rights under the perpetual grant, readjusted as aforesaid, as a successor in title thereto of Peter Minor, that thereafter, that year, appellee entered into the lease and agreement, ending December, 2004, with Electric Company under the terms, provisions and conditions set forth in that lease (Stipulation Exhibit No. 3, R. 49), and as hereinabove described; and that the present State Dam is the successor of the original State Dam, with which the state

replaced Minor's dam. It is about 1000 feet long, 12 feet high, and creates a water power by reason of the 20 miles of water impounded back of it. The flow of the water in the canal is regulated by Lock No. 9, constructed by the state as a part of the canal in 1842. There was no navigation on this canal for more than 30 years prior to the institution of this suit.

The bill of complaint further shows the passage by the General Assembly of Ohio on May 11, 1927, of the Act attacked in this case (112 Ohio Laws 350; Appendix, this brief), which Act declares an abandonment for both canal and hydraulic purposes of that part of the Miami and Erie Canal extending from its connection with the Maumee River above the Grand Rapids State Dam northeasterly to the Maumee side-cut in Maumee, Ohio; attempts to declare all water leases, contracts and grants on said portion of said canal to be null, void and of no effect and directs the highway director of Ohio to drain the water out of said canal and prevent the water of the Maumee River from entering the same; that said Act attempts so to declare the perpetual grant to Peter Minor and appellee's said leasing contract null, void and of no effect without making or providing for the making in any way of compensation to appellee for the loss of its rights under said contracts, and that said highway director intended and was threatening to comply with the commands of said Act and therein drain all the water out of said canal and away from said mill and prevent the waters of the Maumee River from entering said canal, and all this without making any compensation to appellee for such destruction of its rights under said grant and leasing contract. The Act also author-

ized the county commissioners of Lucas County, Ohio, to drain the water from the canal and prevent the water of the river from flowing into or through it, the purpose and effect of these provisions being to deprive appellee of its water power, render its plant useless and wipe out its milling business, which has been carried on without interruption for about 50 years, last past.

All of the above facts are admitted in the answers of appellants (R. 18), and under the stipulation and agreement between the parties it is admitted that the water used by appellee in the operation of said mill, under appellee's said leasing contract, constitutes a water power of at least 225 horsepower and is of a value in excess of $75,000.00 (R. 35).

In the stipulation between the parties it is further agreed that the original leases, agreements, grants, deeds, records of administrative boards, legislative or other resolutions, map of the canal, and special and general laws of the States of Ohio and Indiana and of the Congress, all as listed or referred to on Stipulation Exhibit No. 4 (R. 57), may be considered as offered and received in evidence without formal proof, and that copies of the same, respectively, except constitutional sections and resolutions and laws, are attached to the stipulation and may be used in evidence in lieu of the originals and be designated as "Stipulation Exhibits" numbered consecutively from 1 up (R. 31);

That Lock No. 9, or guard lock, is also known as Lock No. 44;

That Stipulation Exhibit No. 1 is a true copy of the agreement between the State of Ohio and Peter Minor,

executed on the 1st day of September, 1842, as alleged in the bill of complaint (R. 32);

That Stipulation Exhibit No. 2 is a true copy of the correctly recorded official proceedings of the board of public works of Ohio, which proceedings were taken and recorded in the board's office on February 23, 1846, and show the readjustment of the rights of Peter Minor under the contract of September 1, 1842 (R. 32);

That Stipulation Exhibit No. 3 is a true copy of appellee's lease with The Defiance Gas & Electric Company, executed in the year 1922 and being the lease referred to in paragraphs 1 and 10 of the bill of complaint, said lease running to December 19, A. D. 2004 (R. 31, 1 and 15);

That Stipulation Exhibit No. 4 is a list of legislative Acts and resolutions considered as in evidence in the case (R. 57);

That Stipulation Exhibit No. 5 is a map of the Miami and Erie Canal and is a true representation of all the data shown thereon (R. 63).

It is also agreed that the Electric Company is the owner of all the water power and other rights granted by the State of Ohio to Peter Minor in 1842 and 1846, but that its ownership is subject to the rights of appellee under the lease between the Electric Company and appellee (R. 34);

That the present Grand Rapids State Dam is constructed of highest grade reinforced concrete in compliance with the highest standards of engineering requirements for such work, and that guard lock, or Lock No. 9, is constructed of stone in compliance with similar requirements (R. 34);

That the waters in the canal run northeasterly at all times from the pool of the Maumee River above the State Dam and past appellee's mill known as the Pilliod mill (R. 35);

That appellee has at all times since its acquirement of said lease complied with all the terms and provisions thereof and of the lease of said Peter Minor (R. 36); and

That appellee is still operating said Pilliod mill under said lease agreement with the Electric Company and therein is using the amount of water stipulated in said lease for it to use in such operation (R. 36).

II

SUMMARY

(1) **Whatever May Have Been the Capacity in Which the State Functioned in Respect of the Miami and Erie Canal While Used for the Purposes of Navigation, and Whatever the Previous Decisions in Actions at Law Brought by Lessees of Water Against the State's Grantees of Abandoned Canal Property, It Is Now the Settled Law of Ohio That, as to Water Power Rights Not Heretofore Judicially Construed and Determined, the Function of the State Is That of a Commercial Proprietor Engaged in the Sale of Water to Individuals for Power Purposes; and the Rights and Obligations of the State as Such Proprietor Are the Same as Those Applicable to Like Transactions Between Individuals. State ex rel. Crabbe, Attorney General vs. Middletown Hydraulic Company, 114 O. S. 437.**

(2) The Foregoing Rule Announced in the Case of State ex rel. vs. Middletown Hydraulic Co., Supra, Is Consistent With the Proprietary Function of the State in Respect of Its Canals Ever Since Their Inception.

(3) Construing Together the State's Occupancy of Minor's Property When the Canal Was Constructed in 1842 and the State's Grant to Minor Dated September 1, 1842, the State's Title to Minor's Property Was Never More Than a Qualified Fee, i. e., a Fee Subject to Minor's Fee Simple Title to the Water Power.

(4) The Right of the State to Grant a Water Power in Perpetuity.

(5) Entirely Apart from the Decision of the Ohio Supreme Court in State ex rel. vs Middletown, etc., Co., Supra, No Case Has been Cited Sustaining the Right of the State to Abrogate by Legislative Enactment a Water Power Grant Such as the One in the Case at Bar. The Proposition That the State, by the Enactment of a Canal Abandonment Act Whereby All Water Power Rights Theretofore Granted Are Declared Void, May Extinguish Water Power Rights Such as Those of the Plaintiff, Is Unsupported by Any Decision Upon Which the State Relies.

(6) Appellee Has No Adequate Remedy at Law.

(7) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Shows on Its Face That Its Enactment Was Not in Good Faith.

(8) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Directly Impairs the Obligation of the State's Contract with Minor, and, as Such, Deprives Appellee, as His Successor, of Its Property Without Compensation and Without Due Process of Law in Contravention of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

III

ARGUMENT AND AUTHORITIES

(1) Whatever May Have Been the Capacity in Which the State Functioned in Respect of the Miami and Ehie Canal While Used for the Purposes of Navigation, and Whatever the Previous Decisions in Actions at Law Brought by Lessees of Water Against the State's Grantees of Abandoned Canal Property, It Is Now the Settled Law of Ohio That, as to Water Power Rights Not Heretofore Judicially Construed and Determined the Function of the State Is That of a Commercial Proprietor Engaged in the Sale of Water to Individuals for Power Purposes; and the Rights and Obligations of the State as Such Proprietor Are the Same as Those Applicable to Like Transactions Between Individuals. State ex rel. Crabbe, Attorney General, vs. Middletown Hydraulic Company, 114 O. S. 437.

The foregoing rule, announced by the Supreme Court of Ohio in the recent case of *State ex rel. Crabbe,*

Attorney General, vs. The Middletown Hydraulic Company, 114 Ohio State 437, would seem to settle the issues here in favor of the appellee. There the court said:

> "Whatever may have been the capacity in which the state functioned in the construction of the Miami and Erie Canal for the purpose of a navigable highway across the state for the use of the general public, its function now, since the abandonment of the canal as a navigable highway, is that of a commercial proprietor, engaged in the operation of a great power plant for the sale of power and water to private individuals, and the rights of the state, as such proprietor, in this particular property, which have not heretofore been judicially determined, but are to be determined now for the first time, should be and will be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.
>
> 'In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign capacity, and, being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.' *Cleveland Terminal & Valley Rd. Co. vs. State ex rel.*, 85 Ohio St. 251; 97 N. E. 967; 39 L. R. A. (N.S.) 1219."

Again, at page 457 the court said:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed,
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.

(2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use.

The demurrer to the third defense is sustained."

In that case the facts were strikingly similar to those in the case at bar. There one Abner Enoch, the owner of a dam across the Miami River near the City of Middletown, together with a mill and mill race adjacent to the river, sold a part of his property to the state for canal feeder purposes, excepting in his grant "all water privileges reserved to myself as to mill seats, etc." As in the case of Minor's dam in the case at bar, Enoch's dam was replaced with a new dam owned by the state, and continuously thereafter for almost one hundred years the water from the pool created by the dam had been used to supply the Miami and Erie Canal by means of the feeder, the latter of sufficient capacity to supply the requirements of both Enoch's mill and the canal. The Hydraulic Company was Enoch's successor in the title to the mill property and its appurtenant water rights, and at the time when the action was commenced, also as in the case at bar, the canal had long been abandoned for navigation purposes. At a point on the canal below the Hydraulic Company's mill, however, the state was leasing the canal waters to lessees for hydraulic purposes, and the object of the action was to determine by what right the Hydraulic Company was using a portion of the water which otherwise would have been available

to those lessees of the state. Except for the fact that in the case at bar the state is attempting to *destroy* the appellee's water power for the benefit of Lucas County and the municipalities adjacent to the canal instead of attempting to take the water from the appellee in order to give it to other lessees, the cases are precisely the same. To state the two cases as concisely as possible, in the *Middletown* case the Supreme Court sustained in perpetuity a water power contemporaneously reserved to the owner in his grant of mill property required by the state for canal purposes. In the case at bar, instead of a water power reserved to the mill owner in his grant to the state, the state contemporaneously with its acquisition of the mill property for canal purposes, recognized and confirmed the owner's water power by a grant to him in perpetuity. In the one case the water power was created by express reservation in the owner's grant to the state; in the other by express provision in the state's grant to the owner. In principle the two cases are precisely the same.

That the Supreme Court intended, by the enunciation of the rule above stated, to definitely fix the status of the state in respect of its water power as that of a *proprietor*, bound by the same contractual obligations as an individual, and also to refute the proposition that the state, in its sovereign capacity, may abrogate its water power contracts at will, is clearly shown from the dissenting opinion of His Honor Judge Jones, page 459 and particularly page 464, wherein the learned judge relies upon the cases of *Hubbard vs. Toledo*, 21 O. St. 379; *Fox vs. Cincinnati*, 33 O. St. 492; *State ex rel. vs. Cincinnati*, 37 O. St. 157, and the other cases relied upon

by the state in the case at bar, to support his contention that the state was under no obligation to continue the furnishing of water under Enoch's grant. The majority of the court, however, affirmed the validity of the grant and, *sub silentio*, overruled the dicta in those cases at least in so far as applicable to Enoch's grant in that case and the grant to Minor in the case at bar. The cases *supra* will be considered in greater detail in the subsequent pages of this brief; suffice it to say at this point that no one of them presented a situation similar to that in the case at bar. Here, prior to the coming of the canal, Minor was in possession of his water power and mill property *in fee simple*. The state appropriated his mill and mill race, including his water power, and thereupon, by way of restitution, restored the water power to him subject only to the necessities of navigation. The grant was an *absolute* one to Minor, his heirs and assigns forever. He was in no sense a *lessee*. By so restoring the water power to him the state was carrying out its moral and legal obligation so to do, and having done so, the moral obligation alone, quite apart from the legal one, was sufficient to support the contract. As said by the court in the case of *Maumee Valley Electric Co. vs. Toledo*, 13 Fed. (2nd) 98, 104, wherein the City of Toledo was enjoined from interfering with the leased water along the eighteen-mile level of the canal immediately south of the city:

> "Assuming, *without so deciding*, that the state could have lawfully terminated plaintiff's water rights and privileges by an abandonment of the canal for navigation purposes and a sale of the canal lands, it is enough that, as we think, *it chose rather to recognize its moral obligation* to respect

> the rights of its lessees, property holders and citizens. That it had the legal and moral right to do so is undeniable. A contrary course would have been unnatural and inequitable."

Having, as said by the court in that case, the legal and moral *right* to respect its grant of water power, the state, as a proprietor, is under the corollary *obligation* to respect its grant in the case at bar.

Nor will the court fail to note the insistence with which the Ohio Supreme Court in the *Middletown* case upheld the water power as valid, not only in Enoch, but in his heirs and assigns, including the Hydraulic Company, notwithstanding the reservation in Enoch's grant contained no words of perpetuity. To do so the court was required to look to the *intention* of the parties as evidenced by the act of the state in permitting Enoch and his assigns the unmolested use of the water power over a long period of years. In the case at bar the court is under no such embarrassment in respect of words of perpetuity, the grant being expressly to Minor, "his heirs and assigns forever," and on the subject of intention, it is only necessary to point out that for more than eighty-five years last past Minor and his successors in title have been regarded by the state as the absolute owners of the water power subject only to the necessities of navigation. On this subject the court in the *Middletown Hydraulic* case, at page 453, said:

> "This court in the case of *Miller vs. Wisenberger*, 61 Ohio St. 561; 56 N. E. 454, declared:
>
> 'Section 8 of the Canal Act of 1825 should be so construed as to fairly carry out the intention and understanding of the officers of the state on the

one hand, and the landowner on the other, in each case, as near as the same can be ascertained from what was done, and the situation and surroundings of the premises in question.' "

Looking further to the intention of the parties at the time when Minor's grant was executed, there can be no serious question but that the state, having appropriated the water power which he owned in fee simple and had never willingly relinquished, intended by the grant to him, his heirs and assigns forever, to restore the water power to him in fee simple, subject only (as heretofore observed) to the demands of navigation, just as in the *Middletown Hydraulic* case the state, being about to appropriate Enoch's water power likewise owned by him in fee simple, was held to have intended, by the acceptance of his grant even without words of perpetuity, to confirm the water power to him in fee simple. If not, it is pertinent to inquire why Minor and his successors, including the appellee, have been permitted the unmolested use of the water during all of these years? What did the state intend by the grant to Minor, his heirs and assigns forever, except to convey a fee? Should the intention as expressed by those words be any the less enforced in this case than the intention in the *Middletown Hydraulic* case, where no such words were used? And, if as held in that case, the grant was valid in Enoch and his successors, and if, as further held there, the state in respect of its canal property "acts in a proprietary and not in a sovereign capacity, * * * amenable to all the rules of justice which it prescribes for its citizens," can there be any question as to the rights of the appellee company, which not only relies upon a grant in fee

simple but a grant made in extinguishment of an obligation twice recognized by the state as valid?

It is unthinkable that as compensation for his valuable property and rights owned in fee simple the state intended to grant or Minor intended to accept anything less than a water power in fee simple.

(2) The Foregoing Rule Announced in the Case of State ex rel. vs. Middletown Hydraulic Co., Supra, Is Consistent With the Proprietary Function of the State in Respect of Its Canals Ever Since Their Inception.

In the light of legislative history it will not do to say that the state's function as a proprietor of a water power system is a mere incident, an accident, or its water power created by the canal system a mere by-product, or a left-over, not within the contemplation of the legislature at the time when the canals were originally authorized. From the very beginning the state was not only mindful of the water power to be created by the canal system but determined, as a proprietor, to derive all of the revenue possible from it; in fact, as early as the Act of February 4, 1825, 23 O. L. 50, Chase's Statutes, Vol. 2, page 1472, the state pledged in Section 5,

> "all the net proceeds of tolls, collected on the canals herein described, and of the rents and profits of all works and privileges connected with or appertaining to said canals and belonging to the state."

Also Section 6 of that Act provides that the money pledged and appropriated by the Act,

> "together with the net proceeds of all tolls and of the rents and profits of all works and privileges

> connected with said canals, shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

The "works and privileges" mentioned in those sections referred, of course, to hydraulic works and privileges.

Likewise, the Act of February 7, 1826, Chase's Statutes, Vol. 3, page 1527, authorized the canal commissioners to procure by purchase or otherwise, sufficient land

> "at each and every point on and adjoining the Ohio canals heretofore authorized to be constructed, where the surplus water passing through said canals may be profitably used for hydraulic purposes."

That is to say, not only would the state utilize the water power created by the canals, but the commissioners were definitely authorized to acquire land at points where the power could be used for hydraulic purposes—"profitably used," the Act says.

Section 2 of the same Act authorized the commissioners to sell any lands or lots theretofore acquired for canal purposes,

> "other than those which are situated at points or places on, or adjoining, the line of the Ohio canals, where the surplus water produced by said canals can be advantageously used for hydraulic purposes."

Also Section 5 of the Act of February 11, 1828, Chase's Statutes, Vol. 3, page 1598, authorized the commissioners to sell for hydraulic purposes any water which might "be spared from any state canal or works connected therewith."

The Act of February 18, 1830, Chase's Statutes, Vol. 3, page 1659, after forbidding the use of any canal water for hydraulic purposes except that purchased from the canal commissioners, provides at Section 3 that if, in the opinion of the commissioners, there shall be surplus water in either the canals or their feeders, or at the dams erected for the purpose of supplying the canals with water,

> "the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes; subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state."

The Act of March 3, 1831, Chase's Statutes, Vol 3, page 1862, refers to the construction of feeders and canals "by which a greater quantity of water may be introduced than is required for the purpose of navigation, thereby creating valuable hydraulic privileges," and authorizes the commissioners to convey part of the water so created as compensation for damages to mill sites due to the construction of the canals. Some of the foregoing Acts will be referred to at greater length *post*, the purpose of citing them here being to show beyond peradventure of doubt that from the very beginning of the canals, and as an important result of their construction —even as a part of the inducement to their construction —the state had in mind the creation of a most valuable water power. Furthermore, the Act of February 7, 1826,

supra, 24 O. L. 58, definitely appropriated the sum of $20,000.00 for the purpose of acquiring suitable land along the canals where water could be profitably used for hydraulic purposes. By the Act of January 12, 1837, 35 O. L. 6, an additional sum of $25,000.00 was appropriated for the same purpose, and by the Act of April 3, 1837, 35 O. L. 6, these amounts were increased by further appropriations. Other and subsequent laws enacted by the legislature from time to time make provision for the state's water power and the resulting revenues, but it is not necessary to encumber this brief with cumulative citations on the subject.

Finally, on this branch of the case, the principle announced in the *Middletown Hydraulic* case, in substance, that in respect of its water power the state is bound by its contracts to the same extent as an individual involves no new principle of law, but rather, the natural inclusion of the state's water power within the category of property in respect of which the state's position always has been that of a proprietor. Had the state chosen in this case, upon the cessation of navigation, to discontinue the canal, sell the land, and retire from its position as the sovereign operator of a navigable highway as in the *Hubbard* and kindred cases, other considerations might apply. Instead, and having long ago abandoned the use of the canals for navigation, the state chose to maintain the canals for water power purposes, and in that respect its position is and could be only that of a proprietor, bound by its contracts as an individual. There is no reason why the state should not be so bound. There is every reason why it should be. Annually throughout the United States large sums of money are expended in the

creation of water power; there is an almost universal demand for the preservation of existing power and the development of additional power. Irrespective of the rights under the Minor grant, the Act of the legislature in attempting to destroy the valuable water power in issue here for alleged municipal purposes, constitutes almost an act of vandalism. But entirely apart from that, water power is now a recognized commodity in which a state deals exactly as in respect of its lands, *i. e.*, as an individual, and the Supreme Court of Ohio was right in declaring that in respect of Ohio's not inconsiderable water power, the function of the state is that of a commercial proprietor.

From time immemorial the rule has been that the state, in respect of its canal *lands*, acts in a proprietary capacity, and as such, will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains. In principle, the rule applies with equal force to its grants of canal waters. On this subject, the first clause of the syllabus in *Cleveland Terminal, etc., Co. vs. State*, 85 O. St. 251, is as follows:

> "1. In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains."

Nor will the court fail to note that in the case at bar, just as in that case, the state by the abandonment Act of 1927 expressly retains the land, mill property and mill race ceded by Minor to the state in consideration of the water power. Section 2 of the Act (112 Ohio Laws 350)

provides that the state reserves unto itself "the title to all lands and water to which it is entitled under the various Acts providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal * * *." That being so, the following from the opinion of Mr. Justice Story in *Charles River Bridge vs. Warren Bridge*, 11 Peters 420, cited with approval in *Cleveland Terminal, etc., Co. vs. State*, *supra*, is pertinent:

> "But what, I repeat, as most material to be stated, is that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, *favorably to the grantee*. Why is this rule adopted? Plainly *because the grant is a contract*, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract."

(3) Construing Together the State's Occupancy of Minor's Property When the Canal Was Constructed in 1842 and the State's Grant to Minor Dated September 1, 1842, the State's Title to Minor's Property Was Never More Than a Qualified Fee, i. e., a Fee Subject to Minor's Fee Simple Title to the Water Power.

The exact date when the state took possession of Minor's property is not known, but at page 3 of the bill it is shown that the Wabash and Erie Canal (later the

Miami and Erie Canal) begun in 1837 at the Ohio-Indiana state line, was constructed from there to the Town of Defiance where it joined the Miami Extension Canal then under construction, and that subsequently, in 1842, the canal was extended from Defiance to Providence and thence to Toledo. The state's taking of Minor's property, therefore, and its contemporaneous grant to him of September 1, 1842, not only negatived any intention on the part of the state to occupy the property *exclusively*, but indicated a plain intention on its and Minor's part that there was to be a *joint occupancy* between them. Certainly if there was any exclusive occupany by the state it was not for a long enough period to import a fee simple title under the doctrine of *Malone vs. Toledo*, etc., and the other cases where only the long, open, notorious and exclusive occupancy and use of property for canal purposes was held to have created a fee simple title in the state. There is absolutely nothing in the record in this case proving or even tending to prove that the state ever intended to deprive Minor of his water power entirely or ever intended to occupy his property to the exclusion of his right to use the water power in perpetuity. Upon a like set of facts the tenancy as between the mill owner and the state in the *Middletown Hydraulic* case was held to be *joint*, with a water power in him in fee simple and a qualified fee in the state. It is the position of the appellee, therefore, that notwithstanding the decisions of the Ohio Supreme Court in *Malone vs. Toledo*, 34 O. S. 541; *State ex rel. vs. Ry. Co.*, 53 O. S. 189, and *State vs. Snook*, 53 O. S. 521, wherein the state's title is held to be one in fee simple, none of those cases are controlling here, particularly the hold-

ing in *State vs. Ry. Co.*, 53 O. S. 189, that "whenever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue alone, of such occupancy, vested in the state." There, inasmuch as it was conceded that the land in controversy had been long and exclusively (for more than thirty years) used as a part of the canal system, the foregoing statement could not have been directed to any contested point in the case, but was intended to stress the fact that there must be actual rather than constructive occupancy. Certainly the case is not an authority for the proposition that occupancy, accompanied by a contemporaneous acknowledgment of a water right in the mill owner, would vest the state with a fee simple title, or even that occupancy for a mere week or month or year, followed by such an acknowledgment, would create a fee simple title in the state. As said by the Ohio Supreme Court in *Smith vs. State*, 59 O. S. 278-281, construing *State vs. Ry. Co., supra*:

> "It may be remarked in passing that, inasmuch as there was no real contention as to the fact of appropriation by the state of the land in controversy and its *long* exclusive use as part of the canal system, this proposition of the syllabus (in *State vs. Ry., supra*) settled no contested point in the case, and may properly be treated as simply a predicate for the proposition which follows. However, the term 'actually occupied' imports, *ex vi termini, exclusive* occupancy; so that it would be necessary to show that a claimed occupancy by the state was an exclusive occupancy in order to bring the case within the letter of the proposition. This, we think, the facts fail to establish in the case at bar."

In *Miller vs. Wisenberger*, 61 O. St. 561, the court held that Section 8 of the Act of 1825, *supra*, should be so construed as fairly to carry out the intention and understanding of the officers of the state on the one hand and of the land owner on the other; also that the use of lands or streams for canal purposes, not of a character to apprise the owners that their property was being appropriated in fee simple, did not vest a fee simple title in the state:

> "This section of the statute (Act of February 4, 1825, 23 O. L. 56, Chase's Statutes, p. 1475) should be fairly construed, not rigidly in favor of either party. It should be regarded by the courts at this late day as it was looked upon in the days when the canals were constructed; and to wrest the lands from the owners and vest a fee thereto in the state, facts should appear from which a court can *clearly* see that both parties knew or should have known at the time of the construction of the canals that the lands in question in any particular case had been appropriated and used for canal purposes." (The italics are ours.)

Under those decisions the state's title, to the extent derived from mere occupancy and use, was one in fee simple only when that use was long and notorious and inconsistent with a lesser estate, such as a qualified fee. In the *Middletown Hydraulic* case the court holds categorically that under Section 8 of the Act of February 4, 1825, 23 Ohio Laws 56 (and notwithstanding the decisions in *Malone vs. Toledo, etc.*), the state's title to canal property may lawfully be a qualified fee, *i. e.*, one subject to a reserved water power in the mill owner, thereby creating a joint tenancy; that such joint tenancy may be created by grant *or otherwise*, and that the intention of

the parties as shown by their contemporaneous acts—even by their subsequent conduct—determines the quantum of the estate which each retained or acquired in the property occupied and used for canal purposes. The court said, page 452:

> "There is no provision in the Act expressly prohibiting the canal commissioners from taking less than a fee simple by gift or grant, and, if prohibition is so implied it must be in the language above quoted. Can it be said that it is there clearly implied? The prior decisions of this court, while expressed in broad language, were not based upon facts similar to the facts presented in this case, and the question of the title of the state to the lands there in controversy was not based upon a limited grant or a partial possession and it must be remembered that those decisions were not pronounced until long after the rights of the parties to this action had come into existence by their own particular circumstances, and this court has not yet passed upon the right of the canal commissioners by grant to take *less than a fee simple*. In that situation the departmental construction of its power in that respect, under the Canal Act, acquiesced in and acted upon by all parties interested for so long a period, is at this time a very potent factor in the interpretation of the extent of the power conferred by that Act upon the canal commissioners.
>
> * * * That case (*State ex rel. vs. Ry. Co.*, 53 O. S. 189) is not controlling in the instant case, for the reason that under the averments of the answer and the facts, as disclosed by the exhibits, which, by stipulation, are made a part of the answer, the occupancy of the state was never exclusive, but was an occupancy, *whether under grant or otherwise*, that at all times recognized the right of Abner Enoch and his successors to a joint use

> of the water which passed through that particular feeder, and therefore a joint use of the water and the land upon which the feeder is located."

Had there been a legal condemnation of all of Minor's property, including his water power, and no agreement of September 1, 1842, the state's title would have been one in fee. Here, however, if the state is to prevail it must be upon the theory that, notwithstanding the state's agreement, mere occupancy and temporary use are sufficient to create the highest, the most perfect of all titles, to-wit, a title in fee simple. Under the unusual facts in this case, with the equities so clearly in favor of the plaintiff, every presumption in favor of its title and against the state's title should be indulged:

> "Occupancy by the state for canal purposes of an island in a state reservoir as against the owner, in the absence of condemnation must be actual, open, notorious and direct."
>
> State vs. Fenn, 25 O. C.; 35 C. C. Rep. 75.

(4) The Right of the State to Grant a Water Power in Perpetuity.

On this subject it is respectfully submitted that if the state could, by accepting a grant reserving to the grantor a water power in perpetuity, thereby creating or carving out a water power valid in the owner, his heirs and assigns, as was held in the *Middletown Hydraulic Company* case, the state had an equal right to recognize or create in Minor in the case at bar a like water power in perpetuity, particularly in view of the equities presented by the case. Certainly the position of the Hydraulic Company in the *Middletown* case is now that of

the owner of a valid water power in fee simple. That water power was created by the act of the state in accepting Enoch's grant in which the water power was so reserved. Can it be said that in the case at bar the appellee company, as Minor's successor, is any the less an owner in fee simple merely because instead of taking a grant from him in which the water power could have been thus reserved in perpetuity, the state chose by its agreement of September 1, 1842, to confirm a like water power to him in perpetuity? We think not.

Entirely apart from that, however, *there was, at the time of the grant to Minor, express authority in the state to dispose of water for hydraulic purposes either in perpetuity or for a limited number of years.* Section 3 of the Act of February 18, 1830, Chase's Statutes, Vol. 3, page 1659, provided as follows:

> "Sec. 3. That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purposes of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by, the state, for the purpose of using the same, or such part thereof as they may deem expedient, *to be sold for hydraulic purposes;* subject to such conditions and reservations as they may consider necessary and proper, *either in perpetuity, or for a limited number of years,* for a certain annual rent or otherwise, *as they may deem most beneficial for the interests of the state.*"

Section 6 of the same Act is as follows:

> "Sec. 6. That every lease, grant, or conveyance of water power, shall contain a reservation and condition, that the state or its authorized agents, may at any time, resume the privilege or right to the use of the water, or any portion thereof, whenever it may be deemed necessary *for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with*, and injuriously affect, the *navigation* of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever *such* privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

In the following year (March 3, 1831) the legislature passed the Act entitled "An Act to provide for the purchase of water privileges," Chase's Statutes, Vol. 3, page 1862, in part as follows:

> "That where any feeder to either of the canals of this state, from any stream, which is not navigable and a public highway has been constructed, or many hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating *valuable hydraulic privileges*, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream, between the point where the water is to be taken out and the point at which it is to be returned into such stream; the canal commissioners shall be

> authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided, the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water, can be sold; *or said commissioners may, at their option, convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power to be created as aforesaid, as a compensation for the damages sustained by the taking of such additional quantity of water from such stream.*"

The first of these two Acts authorized the canal commissioners to dispose of the water power in *perpetuity* "for a certain annual rental *or otherwise*"; the second authorized them to "*convey*" the water to owners of mill sites as compensation for damages resulting to mill sites and water power by reason of the construction of the canal and feeder. Minor's mill was located between the point on the river "where the water was (is) to be taken out and the point at which it was (is) to be returned to such stream," the latter at Toledo. By the construction of the canal and feeder and the state's dam, with which Minor's mill race and dam were replaced, a greater quantity of water was introduced into the canal than was "required for the purpose of navigation"; and Minor's mill site having been not only injured but destroyed as the result, the canal commissioners conformably with the latter Act conveyed to him the part of the water power "created as aforesaid," and conformably

with the former Act conveyed it in perpetuity, subject only to the necessities of navigation. The latter, however, was the one and only condition to which his water power was subject, and by the terms of the statute itself (Act of February 18, 1830) as well as the terms of the state's grant to him the state might interfere with or curtail his water power *for the purposes of navigation only*. And of course the proposed abandonment of the canal and the consequent destruction of the water power are not in furtherance of navigation or of anything remotely connected with navigation.

Again, no decisions have been referred to or cited denying the validity of a water power in perpetuity, or upholding, in an action for injunction, the right of the legislature to destroy such a water power or declare it void by an abandonment Act such as the one of 1927. On this point it was argued in the *Middletown Hydraulic* case that the effect of upholding Enoch's water power in perpetuity was to require the state's maintenance of the canal system for a like period co-extensive with such a grant. As said by His Honor, Judge Jones, in the dissenting opinion, page 463:

> "Under the authorities heretofore and hereafter cited, I am unable to bring myself in accord with the connotation in the syllabus that the canal commissioners could accept a grant of land for canal purposes upon which any burden by way of upkeep and maintenance in favor of the grantor could be imposed. If this be the character of Enoch's grant, then, quoting from the opinion of Chief Justice Johnson in *State ex rel. Fanger vs. Board of Public Works*, 42 Ohio St. 607, 615:
>
> 'The state would be compelled to maintain her canals at any sacrifice for the exclusive benefit of

the lessees of surplus water, or become the purchaser of the property of the lessee, thus making the incidental purpose paramount to the public use.'"

The majority of the court held otherwise, however, and on this point the court in *Maumee Valley Electric Co. vs. Toledo, supra*, say (pp. 101-102):

"Broadly stated, the city's defense is this: * * * (d) The state had no right, after abandonment for navigation purposes, to maintain the canal at public expense for commercially supplying water for hydraulic purposes and thus could not be required to do so; * * *. In the view we take of the instant case, it is unnecessary to decide whether the general proposition of law stated in paragraph (d) above applies under the special conditions existing here, including the Law lease and the agreement supplemental thereto, the fact that public navigation of the canal level in question had already ceased before 1910, that for many years by virtue of the Law lease and supplemental agreement, the state had been and was still being relieved of all expense and upkeep of the canal, that the use of water for hydraulic purposes did not interfere with navigation, and that by the supplemental agreement the state expressly sold and leased to plaintiff 'all the increased water passing through' plaintiff's weir. We find it unnecessary to say more in that regard than that the case of *State vs. Middletown Hydraulic Co.*, 151 N. E. 653, decided by the Supreme Court of Ohio since the argument of the instant case in this court seems to lend substantial support to the proposition that *the state had power to continue to keep up the canal and to carry out its existing contracts with plaintiff*, under the special and peculiar conditions prevailing, notwithstanding the abandonment of the canal for navigation purposes."

Notwithstanding the foregoing, the appellee in the present case is not asking that the state be *required* to *maintain* the water power, but merely to refrain from destroying it by converting the canal property to the uses of the municipalities. The dam at Providence is a permanent concrete structure, and the length of the canal from the dam to the appellee's mill is too short to require serious consideration in respect of its upkeep. Not only that, but as heretofore seen, the state is relieved of all expense of upkeep, and the Minor grant requires him and his successors to erect, complete and keep in good repair the regulating weir adjacent to the mill, to keep the head races in good repair and the canal clear of obstructions, so that there is no obligation of upkeep or repair on the part of the state in this case notwithstanding the decision in the *Middletown Hydraulic* case imports such an obligation.

As a corollary of the contention that the state could not grant a valid water power in perpetuity, it was argued in the *Middletown Hydraulic* case that inasmuch as the state in acquiring its canal lands, was without authority to accept anything short of a fee simple estate, therefore when the state acquired Enoch's mill property, the water power reserved to him was necessarily void. This point is insisted upon in the dissenting opinion at pages 462 and 463. In holding to the contrary, however, the court said:

> "There is no provision in the Act (23 Ohio Laws 57) expressly prohibiting the canal commissioners from taking less than a fee simple * * *. This court has not yet passed upon the right of the canal commissioners by a grant to take less than a fee simple."

That the state's title might lawfully be something less than one in fee simple is strongly implied, however, in *Corwin vs. Corwin*, 12 O. St. 629, and *Voight vs. Railway Company*, 58 O. St. 123, wherein the state's title to canal lands was twice held to be a mere easement.

(5) Entirely Apart From the Decision of the Ohio Supreme Court in State ex rel. vs. Middletown, Etc. Co., Supra, No Case Has Been Cited Sustaining the Right of the State to Abrogate by Legislative Enactment a Water Power Grant Such as the One in the Case at Bar. The Proposition That the State, by the Enactment of a Canal Abandonment Act Whereby All Water Power Rights Theretofore Granted Are Declared Void, May Extinguish Water Power Rights Such as Those of the Appellee, Is Unsupported by Any Decision Upon Which the State Relies.

In considering the situation presented by the case at bar the court will not overlook the fact that here the appellee is not a *lessee* of surplus water seeking *damages* against some individual or corporation in whose favor the state has abandoned a portion of its canal property. On the contrary, appellee brings this action as the grantee of an absolute water power right in fee simple, to enjoin the state's officers from enforcing the Abandonment Act of 1927 which undertakes, among other things, to declare the appellee's grant void in so many words. None of the cases relied upon by the state even remotely support the proposition that the state, having appropriated the water power rights of an individual and having, by grant, revested him with those rights and

recognized their validity for more than eighty years, may now declare the grant void, ostensibly in order to devote the canal lands to the purposes of Lucas County and the municipalities along the line of the canal. This is an action in equity. That the state was morally bound to protect—that it should in all good conscience have protected—appellee's rights is settled by the decision in *Maumee Valley Electric Co. vs. Toledo, supra,* and the question here presented is not whether under the Abandonment Act of 1927 the appellee is entitled to damages from the county or the municipalities, but rather whether the state as "a commercial proprietor, engaged in the operation of a great power plant," is not bound by its grants in the same manner and to the same extent as an individual. That none of the cases relied upon by the state are decisive of that question is apparent from the following analysis, in addition to the analysis appearing in the opinion in *Maumee Valley Electric Co. vs. Toledo, supra*:

In *Hubbard vs. City of Toledo, supra,* which was an action for damages and not for an injunction, the question determined was whether or not the Abandonment Act in question there was intended to protect the rights of two classes of lessees or only one, *viz.*, the "lessees of public works" *and* the lessees of surpus water, or the "lessees of public works" *only*, they constituting two entirely separate classes of rights at that time; in short, the case turned on the question of legislative intent, the court holding that the legislature intended to protect and had protected the first class of rights, *i. e.*, those of the lessees of public works, but not the second, *i. e.*, the water rights of the plaintiff Hubbard, pointing out that in the

leases of surplus water not only was there no agreement on the state's part to furnish *any* water but, on the contrary, the state had reserved *the right to terminate the leases and resume the water at any time*—and therefore the lessees possessed no *rights* capable of enforcement. In the present case, however, the state's conveyance was of a definite amount of water, with no right reserved in the state either to terminate the grant or resume the water; so that neither in point of fact or law are the two cases alike or even similar.

Nor will it be forgotten that the abandonment of the sections of canal in issue in the *Hubbard* and other cases relied upon by the state *were coincident with the discontinuance of navigation* on those sections. In the *Hubbard* case the abandonment took place in 1864, and in *Fox vs. Cincinnati, supra; Elevator Co. vs. Cincinnati*, 30 O. S. 629, and *Cincinnati vs. Rogers* (16 Ohio App. Rep. 139) in 1863. On the sections of canal involved in the case at bar and in the *Middletown Hydraulic* case, however, navigation had ceased at least thirty years ago, and ever since then the state has retained the canal property for hydraulic purposes. In such a state of facts it was inevitable for the court in the *Middletown* case to have determined that the state, by its own acts, has become and is now to be regarded as the proprietor of a large and valuable water power.

In *Elevator Co. vs. Cincinnati, supra*, the state had leased the canal to the city by virtue of the Act of March 24, 1863 (60 O. L., p. 44). Subsequently, in 1869, the state leased the water power to the appellee at a point on the part of the canal so leased. The action was to recover damages at law by the owners of the water power

lease, and all that the court held was that the reservations and conditions annexed to the state's grant to the city were not intended to reserve to the state, after title to the canal had vested in the city and the latter was engaged in making improvements according to a plan approved by the state, the right to create *new* water rights "not theretofore existing." The case is in no sense an authority in support of the state's position in the case at bar.

The case of *Fox vs. Cincinnati*, 33 O. S. 492; 104 U. S. 783, furnishes even less support to the state's position. It was also one at law arising under the Act of March 24, 1863, involved in *Elevator Co. vs. Cincinnati, supra*. The appellee's mill had burned down many years before the action was commenced; he had paid no rent under his lease; the canal lock at his mill site had been permitted to become out of repair and the water allowed to seep away, the condition being such that the state might have declared a forfeiture of the lease had it not already been forfeited by abandonment. And all that the court held was that under such circumstances there was no obligation on the part of the city to protect the appellee or respond to him in damages.

The most that can be said for those cases, is that the right of the state to retain the canals for water power purposes after their abandonment for navigation is there doubted. But none of those cases involved that question directly, and so the doubt remained until the decision in the *Middletown Hydraulic* case wherein the court settles the doubt once and for all in favor of the state's right and duty to deal with its water power as an individual.

And in *Maumee Valley Electric Co. vs. Toledo, supra,* the Court of Appeals so construed that case.

The case of *Cincinnati vs. Rogers, supra,* also an action for damages, involved a claim against the City of Cincinnati by lessees of water, not along the part of the canal abandoned in that case, but *along the aqueduct* east and south of the abandoned portion of the canal. All leases for water along the canal had expired, and all that the court determined was that under the terms of the Abandonment Act the lessees of water along the aqueduct were not entitled to damages against the city.

(6) Appellee Has No Adequate Remedy at Law.

The abandonment laws of 1927, 112 Ohio Laws 360, contain no provisions for compensating the appellee and other users of water for the loss occasioned them by the abandonment of the canal. Section 4 of that Act bluntly declares all leases heretofore granted for hydraulic purposes on that part of the canal to be null and void. Whether the agreement of September 1, 1842, between Minor and the state be construed as a sale or as a lease, the situation is the same, because nowhere in the Act is there any provision for compensation to either class, lessees or grantees. Nor is there any such provision for compensation in any other statute of the state, and inasmuch as appellee cannot sue the State of Ohio, nor is there any tribunal through or by which its claim could be considered and paid, it follows as a necessary consequence that the appellee is wholly without remedy at law, adequate or otherwise.

Nor do we think it will be seriously claimed that

compensation can be assessed to the appellee under the Act of February 4, 1825 (23 Ohio Laws 50), Section 8 of which applies to compensation for property taken for canal purposes. Minor's property was appropriated more than eighty-five years ago. It involved a dam, mill race, mill site, water power and other property. As compensation for all of it (except the mill proper) he was granted the water power in issue here, and there certainly is no authority under that Act to take away and destroy the compensation so paid, substituting for it some new compensation neither provided for in that Act nor in any other statute of the state. If the state claims that compensation can be now assessed and paid, we respectfully ask for a citation to the statute or provision to that effect. Certainly it is not in the Act of 1927—nor in the Act of February 4, 1825. Were Minor's water power now to be appropriated by the state for *canal purposes*, undoubtedly Section 8 of the Act in question (23 O. L. 50), providing as it does for compensation in such cases, might afford him an adequate remedy at law. Here, however, his water power is not being taken for canal purposes, but is being destroyed in the interest of the municipalities. Certainly such a taking in this year of grace 1928 can not even remotely relate to the building of the canal in 1842, nor can it, by some process of retroaction, be referred back to the Act of 1825, which refers only to compensation for property taken in canal construction, and not to compensation for property attempted to be wiped out in canal destruction.

And quite apart from the foregoing considerations, how, we respectfully ask, would or could this honorable court proceed in this case to a determination of the fair

value of appellee's water power? Would that value be based upon costs current as of 1825, or 1842, or 1928, and upon what basis would compensation be computed? The proposition is scarcely worth further consideration.

(7) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Shows on Its Face That Its Enactment Was Not in Good Faith.

On this subject it will be first noted that after providing in Section 1 for the abandonment of the canal, Section 3 provides that the lands used and occupied by that part of the canal shall be forever held by the state in fee simple for the purpose of constructing thereon a highway at such times as the state *may hereafter* find convenient. The Act, so far from evidencing any present intention or need of the state to devote the canal bed to that purpose, distinctly belies any such need. This is followed by Section 4, containing, if appellant's contention is sound, the wholly unnecessary provision that all leases for canal or hydraulic purposes shall become null and void *on and after sixty days* from the taking effect of the Act. Up to this point, therefore, the Act attempts a wholly uncalled for, unnecessary thing, to-wit, the destruction of the water power and the cancellation of water leases prior to any need on the part of the state of the land for alleged highway purposes. Then follows the real motive behind the abandonment. By Section 7 the director of highways is to plat so much of the canal as is to be used for highway purposes and so much of it as may be leased for other purposes. *But until the state shall construct the highway*, all municipal corporations through which the proposed highway may (perhaps)

pass *are permitted to use* the canal lands *without compensation.* (Section 8.) Here is a water power granted to the appellee under which it has expended large amounts of money improving the state's property and constructing appellee's own plant, relying on the supposed good faith of the state. For the pretended reason that it is necessary for state highway purposes the legislature proposes to abandon the canal, and then, as an admission that it is not at all necessary for those purposes, the Abandonment Act provides that until the state constructs the highway the municipalities *may use the land gratis.* The Act shows that the proposal of the state to use the canal bed for highway purposes is really not contemplated and entirely apart from the question whether the state may abrogate its water power grants in order to permit a canal bed to be used by municipalities *free of charge*, it is respectfully submitted that here in this court of equity the Abandonment Act should be scrutinized from the standpoint of its lack of good faith, particularly in view of the fact that in 1925 (111 Ohio Laws 367) the legislature's then attempted abandonment of the canal provided compensation to the appellee and a reasonable price to be paid by the county to the state for the canal land. To have to pay for the land and for plaintiff's water power, however, was not to the liking of the county, as it is not to the city, and so we are now confronted with the spectacle of an Abandonment Act providing no compensation for the appellee and permitting the county and adjacent municipalities to use the canal gratis.

To permit the Act attacked here to be executed would amount simply to a turning of this property to

the use, occupation and benefit of the City of Toledo and the other municipalities and townships along the line. Such a course is forbidden by the contract clause and Section 1 of the Fourteenth Amendment to the Constitution.

Missouri Pacific Railway Co. vs. Neb., 164 U. S. 403; 41 L. Ed. 489.

(8) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Directly Impairs the Obligation of the State's Contract With Minor, and, as Such, Deprives Appellee, as His Successor, of Its Property Without Compensation and Without Due Process of Law in Contravention of Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article 14 of the Amendment to the Constitution of the United States.

If, as we confidently expect the court to hold, the grant from the state to Minor constitutes a valid and enforcible contract, it is axiomatic that the Abandonment Act of 1927 would, if put into operation by the appellant officers of the state, directly impair the obligation of that contract, particularly in view of the failure of the Act to provide for compensation and the absence of any other means whereby the appellee might receive compensation, whether at the hands of the appellants or otherwise.

In the *City of Walla Walla vs. Walla Walla Water Company*, 172 U. S. 1; 43 Law Ed. 341, wherein the City of Walla Walla was proceeding to construct a municipal water plant in violation of its agreement incorporated in

the franchise granted to a private water company, the first, second and fifth clauses of the syllabus are as follows:

> "(1) The impairment of a municipal contract for a water supply by establishing its own system of waterworks is not excluded from the constitutional provision against impairing the obligation of contracts, on the ground that the city makes the contract and takes the action which impairs it in its proprietary capacity, and not as an agency of the state.
>
> (2) The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract, protected by the Federal Constitution against state legislation to impair it.
>
> (5) An injunction against the building of waterworks by a city in violation of a contract with a water company will not be denied on the ground of a complete and adequate remedy at law, as the damage by the breach would be great, and perhaps irreparable, and exceedingly difficult to ascertainment."

In this connection the court said:

> "We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the Constitution and laws of the United States. Granting that, in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the consti-

tutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such a contract was conferred by the charter."

Again the court said:

"The objection that a court of equity has no jurisdiction because the plaintiff has a complete and adequate remedy at law is equally untenable. * * * What the measure of such damage was would be exceedingly difficult of ascertainment and would depend largely upon the question whether the value of the plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the plaintiff.

This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce's Executors vs. Grundy*, 3 Pet. 210, 215 (7:655, 657); *Phoenix Mut. L. Ins. Co. vs. Bailey*, 13 Wall 616, 621 (20:501, 503); *Kilbourn vs. Sunderland*, 130 U. S. 505, 514 (32:1005, 1009); *Tyler vs. Savage*, 143 U. S. 79, 95 (36:82, 89)."

It will be noted that there the federal jurisdiction was sustained and the water company granted an injunction notwithstanding, as conceded by the court, it might ultimately have recovered against the city in an action for damages. The case at bar, however, presents

no such possibility, due to the fact that here the appellants in an action for damages would be the state, and it is settled that, without its consent, the state may not be sued in such an action.

Again, in *Terrace vs. Thompson*, 263 U. S. 197; 68 Law Ed. 255, the third clause of the syllabus is as follows:

> "3. Equitable jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injury otherwise irremediable."

At page 214 the court said:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity." Citing a long list of cases.

In *Cavanaugh vs. Looney, Attorney General*, 248 U. S. 453; 63 Law Ed. 354, the first clause of the syllabus is as follows:

> "1. Individuals who, as officers of the state, are clothed with some duty with regard to the enforcement of the state laws, and who threaten and are about to commence proceedings either of a civil or criminal nature to enforce an unconstitu-

> tional Act violating the Federal Constitution, may be enjoined by a federal court of equity from such action."

There injunctive relief was sought against an Act of the Texas legislature empowering the regents of the state university to condemn lands for the purposes of the university campus, and while the injunction was denied, it was only upon the ground that the condemnation proceedings provided by the Act afforded an adequate remedy at law and an appeal ultimately to the federal Supreme Court in the event the state court should finally deny a federal right. In the case at bar, however, the adequate remedy at law is wholly lacking—there is no remedy at law at all—and the only remedy available to appellee is in equity.

In *Louisville & Interurban R. R. Co. vs. Greene, Auditor*, 244 U. S. 499; 61 Law Ed. 1280, the second clause of the syllabus is as follows:

> "State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a federal court of equity from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, which are asserted to violate the Federal Constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination."

Nor does the fact that the grant to Minor was made by the board of public works of the state instead of by

the state itself, by direct grant of the legislature, render the Abandonment Act of 1927 any less a state statute impairing the obligation of a state contract. In *Mobile Gas Co. vs. Patterson*, 290 Fed. 476, 483, the court said:

> "How, then, may we doubt that the power of the state may be restrained by a contract contained in the charter of the corporation, or how are we to distinguish between a contract contained in the charter of a corporation and a contract entered into by the state through a public board, which is expressly authorized to enter upon the same?
>
> The precise question, as we understand it, came before the Supreme Court of the United States in the case of *Bridge Proprietors vs. Hoboken Land & Improvement Co.*, 1 Wall. 116; 17 L. Ed. 571, where the legislature of the State of New Jersey had appointed a commission with powers to contract for the building of one bridge over each river, authorizing them to fix rates for tolls taken by the builders and grant them a right to these tolls for ninety-nine years. The Act also contained a provision that it should be unlawful for any person or persons to build any other bridge within the limits which were defined on each side of these bridges, and the question presented was whether the contract thus made by the commission under authority from the legislature was a contract of the state, which was protected against impairment by the provisions of the Constitution, and it was there held that it was entirely competent for the state to delegate its authority to contract to the bridge commissioners, and that the contract when entered into by them, became a contract of the state, and was protected against impairment by the constitutional provisions. This case was cited with approval in the case of *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 650; 6 Sup. Ct. 252; 29 L. Ed. 516, where it was declared:

> 'In *Bridge Proprietors vs. Hoboken Co.*, 1 Wall. (68 U. S.) 116; 17 L. Ed. 571, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the "said contract should be valid on the parties contracting as well as on the State of New Jersey," but that it should not be lawful "for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years," was a contract whose obligation could not be impaired by a law of the state.' "

Proceeding to discuss the same subject further, the court said:

> "The instances in which such contracts on behalf of the state have been entered into through commissions are not, however, confined to these cases. Mr. Justice Brown, in the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, 9; 19 Sup. Ct. 77, 81 (43 L. Ed. 341), reviewed the earlier decisions and commented:
>
> 'It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in *State vs. Cincinnati Gas Light & Coke Co.*, 18 Ohio St., 262, 293: "And assuming that such a power" (granting franchises to establish gas works) "may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with

the necessary authority." The case is directly in line with those above cited. See also *Wright vs. Nagle*, 101 U. S. 791; *Hamilton Gas Light & Coke Co. vs. Hamilton*, 146 U. S. 258, 266; *Bacon vs. Texas*, 163 U. S. 207, 216; *New Orleans Waterworks Co. vs. New Orleans*, 164 U. S. 471.' "

Finally, in *Cuyahoga River Power Co. vs. Akron*, 240 U. S. 462; 743 Law Ed. 743, the syllabus is as follows:

> "A federal District Court has jurisdiction without diversity of citizenship of a bill brought by a hydro-electric power company to prevent a municipality from appropriating the company's asserted paramount rights through the enforcement of an ordinance for the appropriation of the waters of a stream, where the bill, after setting out various passages from the state statutes and Constitution, and averring that the city has no constitutional power to take the company's property and franchises, or any property for a water supply, alleges that the city does not contemplate instituting proceedings against the company, but intends to take the latter's property and rights without compensation; that it is building a dam and has taken steps that will destroy the company's rights; that it is insolvent; that the purpose of the ordinance and statutes referred to is to appropriate and destroy those rights without compensation; and that in so acting it violates the contract and due process of law clauses of the Federal Constitution."

Inasmuch, however, as the jurisdiction of the court is not questioned, further citation of authorities would seem to be superfluous.

CONCLUSION

In conclusion, it is respectfully submitted that:

1. Under Section 8 of the Act of February 24, 1825, and the other Acts heretofore referred to, the canal commissioners had the right, in acquiring mill property for canal purposes, to reserve or confirm to the mill owner the right to use a part of the canal water for power purposes in perpetuity.

State ex rel. Crabbe vs. Middletown Hydraulic Co., *supra.*

2. The grant of property for canal purposes from a mill owner to the state, which reserved to the grantor such a water power in perpetuity, sustained in that case, is no different in principle from the taking by the state of the mill owner's property and the concurrent conveyance by the state of the water power to him and his heirs forever, present in the case at bar.

3. In such case the function of the state is that of a proprietor, and its conveyance of the water power is as valid and binding as though made by an individual.

4. Whether or not it is the duty of the state to insure the continued use of the water power by maintaining in good repair the dam and canal creating it, the state at least has no right to *destroy* the water power, whether by declaring its conveyance—its solemn contract—void, or by directing its officers to drain off the water, or by authorizing the county commissioners to drain it off and use the canal property for their own purposes.

5. Particularly is this so where the state retains the dam by which the water power is created.

6. No adjudicated case contravenes any of the foregoing propositions.

7. The conveyance of the water power to Minor, his heirs and assigns, was upon a valid, valuable consideration which the state, by the terms of the Abandonment Act of 1927, still retains.

8. There is no method by which compensation may be awarded the appellee, as Minor's successor, for its loss of the water power sought to be destroyed by the state.

9. Appellee is therefore without remedy at law.

10. The abandonment Act of 1927 impairs the obligation of the state's contract contained in the conveyance of September 1, 1842, in contravention of Section 10, Article I of the Constitution of the United States.

11. The Act attempts to deprive appellee of its property without due process of law, in contravention of Section 1 of Article XIV of the amendments to the Constitution of the United States and in contravention of Section 19 of Article I of the Constitution of Ohio.

12. In accordance with the principles of equity and fair dealing the decree should be affirmed.

Respectfully submitted,

U. G. Denman,
Karl E. Burr,
T. W. Christian,
Counsel for Appellee.

APPENDIX

(Amended Senate Bill No. 48.)

An Act

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all Acts in conflict therewith.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof, in Providence Township, Lucas County, Ohio.

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

Section 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various Acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio.

Sec. 14178-2. Used and occupied lands to be held for the State of Ohio in fee simple.

Section 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient.

Sec. 14178-3. When existing leases shall become null and void.

Section 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done.

Sec. 14178-4. Abandoned portion shall be under supervision and control of state highway director.

Section 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal.

Sec. 14178-5. Surveys and maps to be made.

Section 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio, shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor.

Sec. 14178-6. Making of plat or plan.

Section 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes.

Sec. 14178-7. Use of lands before highway is constructed and improved.

Section 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation.

Sec. 14178-8. Leasing of adjacent lands; manner.

Section 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant, for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county,

township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement.

Sec. 1417 8-9. Right to remove bridges, to grade and construct roads and streets.

Section 10. The county commissioners of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain

the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith.

Sec. 14178-10. Sale prohibited; exception.

Section 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio.

Sec. 14178-11. Defining term highway director.

Section 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways.

Sec. 14178-12. Repealing section.

Section 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed.

O. C. Gray,
Speaker of the House of Representatives.
Earl D. Bloom,
President of the Senate.

Passed April 4, 1927.

Senate—

Passed, notwithstanding the objections of the governor, May 10, 1927.

Earl D. Bloom,
President of the Senate.

House of Representatives—

Passed, notwithstanding the objections of the governor, May 11, 1927.

O. C. Gray,
Speaker of the House of Representatives.

The sectional numbers on the margin hereof are designated as provided by law.

Edward C. Turner,
Attorney General.

Filed in the office of the secretary of state at Columbus, Ohio, on the twelfth day of May, A. D. 1927.

Clarence J. Brown,
131B. Secretary of State.